No. 80-901

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Raymond J. Donovan, Secretary of Labor,
United States Department of Labor,

Appellant,

versus

Douglas Dewey and
Waukesha Lime and Stone Company,

Appellees.

**On Appeal from the United States District Court
For the Eastern District of Wisconsin**

BRIEF OF ACLU FOUNDATION OF SOUTHERN CALIFORNIA, *AMICUS CURIAE*, IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS CURIAE[1]

This case presents the question whether warrantless safety and health inspections, authorized by Section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. II) § 813(a), violate the Fourth Amendment.

[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court pursuant to Rule 36.2 of the Rules of this Court.

For nearly 60 years the American Civil Liberties Union has devoted itself exclusively to protecting the fundamental civil rights of persons within the United States. The ACLU Foundation of Southern California is a regional affiliate of the American Civil Liberties Union.

The ACLU in Southern California itself was born out of a labor dispute during which citizens protesting the arrest of striking workers on a picket line were themselves arrested for publicly reading the Declaration of Independence. Since its inception, the ACLU Foundation of Southern California has consistently supported the fundamental individual and collective rights of workers and has appeared before this Court on such issues. (See, e.g., *Babbitt v. Farm Workers,* 442 U.S. 298 (1979).)

The instant case implicates the fundamental rights of workers. Specifically, in the Mine Safety and Health Act of 1977 Congress has determined that the mining industry is sufficiently dangerous to require warrantless health and safety inspections limited to the work areas of the mine workers. Congress has further determined that to effectuate the warrantless inspection program the consent of the mine workers, individually and collectively, to such inspections may be inferred.

The decision below improperly invalidated the Act on the ground that it violates the Fourth Amendment rights of the mine operators. In so doing, the district court failed to recognize the mine workers' right to consent to the limited inspections of their work areas and thereby to benefit from the expertise of inspectors trained to recognize imminent dangers and compliance with corrective orders.

Amicus agrees with the Appellant that the mining industry is of such a dangerous nature that the consent of the mine operator should be implied under this Court's prior decisions in *United States v. Biswell,* 406 U.S. 311 (1972) and *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1979). However,

in this brief amicus will argue that the consent of the mine worker to the limited inspections provided by the Act should be implied and validated. Accordingly, even without the consent of the mine operator, there is no Fourth Amendment violation.

I.

SUMMARY OF ARGUMENT

A. A search or inspection authorized by consent is "wholly valid." *Schneckloth v. Bustamonte,* 412 U.S. 218, 222 (1973). The necessary permission to search may be obtained either from the owner of the premises or from a third party who possesses a "sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock,* 415 U.S. 164, 171 (1974). In addition, under appropriate circumstances the necessary consent will be implied from an examination of the activity in which the "consenting" party is engaged. See *United States v. Biswell,* 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970).

B. Under these fundamental principles of Fourth Amendment law, the warrantless safety and health inspections authorized by Section 103(a) of the Mine Safety Act are constitutionally permissible.

1. Mine employees have a sufficient relationship to their work areas to permit the warrantless inspections authorized under Section 103(a) of the Mine Safety Act. Those inspections have been carefully limited to areas over which the workers have joint access with the operator. Accordingly, it is reasonable to conclude that the workers, as well as the operator, can permit inspections to determine whether imminent danger exists or whether the company is complying with mandatory health and safety standards.

2. To be sure, there is no express employee consent to inspect the work areas of mines. Nevertheless, Congress has determined that, in view of the historic employer-

employee relationship in the mining industry, it is unreasonable to expect such express consent to safety and health inspections of work areas by mine employees. Accordingly, Congress in the Mine Safety Act has found, in effect, that public policy requires that such consent be implied.

3. A finding of implied consent by mine employees to safety and health inspections of their work areas is reasonable under the Fourth Amendment. Such implied consent should be upheld by this Court because of the importance of the inspections, the limits placed on the time, place and manner of the inspections and the restricted privacy interest of the mine operator in preventing the warrantless inspections authorized by Section 103(a) of the Mine Safety Act.

II.

MINE EMPLOYEES CAN GIVE VALID, THIRD-PARTY CONSENT TO WARRANTLESS INSPECTIONS OF THEIR WORK AREAS

A. Third Parties May Validly Consent To Warrantless Searches

This Court has repeatedly recognized both that a search conducted pursuant to a valid consent is constitutionally permissible, *e.g., Schneckloth v. Bustamonte,* 412 U.S. 218, 222 (1973); *Katz v. United States,* 389 U.S. 347, 359 n. 22 (1967) ("A search to which an individual consents meets Fourth Amendment requirements"), and that such consent may be obtained from a third party with a sufficient relationship to the premises or effects to be inspected. *E.g., United States v. Matlock,* 415 U.S. 164, 171 (1974); *Frazier v. Cupp,* 394 U.S. 731, 740 (1969).

In *Matlock* the Court explained that the validity of a third party consent depended not upon formal, legal refinements, but upon an analysis of the actual relationship between the consenting party and the effects to be inspected:

"[W]hen the prosecutor seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.[7]

"7. Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justified the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the coinhabitants has the right to permit the inspection in his own right and that the others have assumed the risk and that one of their number might permit the common area to be searched."

415 U.S. at 171 & n.7 (citations omitted). See also *Frazer v. Cupp, supra,* at 740, in which the Court upheld the validity of a third-party-consent search and refused to engage in "metaphysical subleties" relating to notions of agency and express authority.

B. Mine Employees Possess A Sufficient Relationship To Their Work Areas To Permit Warrantless Safety and Health Inspections

Applying the practical, "sufficient relationship" test articulated by the Court in *Matlock*, it is apparent that mine employees may validly consent to the limited health and safety inspections of their work areas authorized by the Mine Safety Act.

The Mine Safety Act requires frequent inspections of coal or other mines, with a minimum of four complete inspections of underground mines each year, and a minimum of two in-

spections for surface mines per year. The purposes of these inspections are to determine whether an imminent danger exists and whether the company is complying with mandatory health or safety standards. 30 U.S.C. (Supp. II) § 813(a). The statute directs that no advance warning is to be given only when the inspection is made for one of these limited purposes. *Ibid.*[2] Moreover, as interpreted by certain Courts of Appeals, these provisions permit warrantless inspections only in the "active workings" of mines. A warrant is still required for the "inspection of offices and other areas where the operator has general expectation of privacy." *E.g., Marshall v. Nolichuckey Sand Co.*, 606 F.2d 693, 696 (6th Cir. 1979).

Although the mine worker does not have a property interest in the usual sense in the areas to be inspected, the warrantless inspections authorized by the Mine Safety Act are thus carefully limited to areas over which the workers enjoy mutual use and joint access with the operator. As to the limited areas to be inspected under this statutory scheme, it is reasonable to recognize that the mine workers, as well as the operator, can permit the inspection. Cf. *United States v. Miller*, 425 U.S. 435, 442 (1976) (holding that a depositor's interest in bank records created by information he/she had furnished the bank in the ordinary course of business was not sufficient to overcome the bank's compliance with a subpoena which ordered production of the records.)

Significant difference between the broad search rights authorized under Section 8(a) of the Occupational Safety and Health Act of 1970 (OSHA) and the limited inspection permitted by Section 103(a) of the Mine Safety Act distinguish this case from *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

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[2] The Act also provides for warrantless "spot inspection[s] . . . during every five working days at irregular intervals," if "methane or other explosive gases" are present, or if a gas explosion has occurred resulting in a death or serious injury within the previous five years, or "some other especially hazardous condition" exists. 30 U.S.C. (Supp. II) § 813(i). It can hardly be gainsaid that a mine worker would consent to inspections in such circumstances, and such consent is therefore properly inferred.

Section 8(a) of OSHA authorized the Secretary to enter *any* establishment or area where work was being performed by an employee and inspect "all pertinent conditions, structures, machines, apparatus, devices, equipment and materials." In addition, by regulation the Secretary had expanded the scope of any search to include records related to the purpose of the inspection. 29 C.F.R. § 1903.3 (1978). See *Marshall v. Barlow's Inc., supra*, 436 U.S. at 324 n.22. The direct relationship of the employee to the materials and papers that were subject to warrantless inspection under OSHA was thus quite tenuous.

The inspection provisions of the Mine Safety Act, by contrast, are more limited and closely defined. As a result, the permissible scope of inspection under the statute relates directly to the employees' activities inside the mine and to the areas over which they have joint access and control with the operator. Cf. *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974) (upholding warrantless inspection of smoke emissions following entry onto owner's premises and noting that constitutionally permissible inspection was not "related to respondent's files or papers"). Accordingly, recognizing the employee's right to consent to an inspection under the Mine Safety Act is both reasonable and fully consistent with this Court's invalidation of OSHA inspections in *Barlow's*.

III.

MINE EMPLOYEES HAVE GIVEN THEIR IMPLIED CONSENT TO WARRANTLESS HEALTH AND SAFETY INSPECTIONS OF THEIR WORK AREAS

A. This Court Has Recognized The Validity of an "Implied Consent" To Warrantless Administrative Inspections

This Court has recognized that persons may impliedly consent to warrantless administrative searches. Thus, in *United States v. Biswell*, 406 U.S. 311 (1972), the Court held that a

pawnshop operator who was federally licensed to deal in firearms had by virtue of his/her choice of profession effectively waived any constitutional objection to reasonable searches of the premises. Mr. Justice White wrote:

> "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms and ammunition will be subject to effective inspection."
>
> 406 U.S. at 316.

Similarly, in *Colonnade Catering Corp. v. United States,* 397 U.S. 72, 77 (1970), the Court approved a warrantless inspection of a licensed liquor dealer's storeroom where the dealer reasonably was aware of the long history of "close supervision and inspection" of the liquor industry by government. "The businessman in a regulated industry in effect consents to the restrictions placed upon him." *Almeida-Sanchez v. United States,* 413 U.S. 266, 271 (1973) (summarizing *Biswell* and *Colonnade*).

Here, the mine operator has chosen to enter a business with well known, even notorious dangers. The *Colonnade* and *Biswell* principles instruct that the consent of the mine operator should be inferred. More importantly, it is manifestly proper to infer the consent of the mine *worker* to the limited inspections of the work area provided for in the Act for the purpose of protecting that miner's life and health.

B. It is Reasonable To Infer the Consent of Mine Employees to the Health and Safety Inspections Authorized By the Mine Safety Act

The entire thrust of the Federal Mine Safety & Health Act is to benefit and protect what Congress has declared is the mining industry's most "precious resource—the miner." (30 U.S.C. (Supp. II) 801(a)).

As it was reasonable to infer consent to a warrantless inspection from the pawnshop operator in *Biswell* and the liquor dealer in *Colonnade,* so it is reasonable to infer consent

from mine operators in this most dangerous industry. Furthermore, it is entirely reasonable to infer consent of the mine employee to safety and health inspections of his or her work area without a warrant.

The work area inspection is for the miner's benefit and protection. In sharp contrast to its impact upon the parties whose consent was implied in the *Biswell* and *Colonnade* cases, the inspection here places no burden upon the miner. See *Almeida-Sanchez, supra,* 413 U.S. at 271. No discernible privacy interests of the miner are implicated; the nature and purpose of the inspection could hardly be more agreeable to the miner. There is simply no reasonable basis for declining to infer the miner's consent to inspections expressly designed to benefit and protect that miner.

1. *Congress determined that it was reasonable to infer consent*

The plain language of the Act and its legislative history make clear the Congress found it reasonable to infer consent from the miner employees whose work areas would be subjected to warrantless inspections. The Congressional findings and declaration of purpose included within the Act state that the law was drafted to afford the miner (and his/her family) protection for his/her health and safety:

> "Congress declares that—
>
> "(a) the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner;
>
> "(b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines cause grief and suffering to the miners and to their families;
>
> "(c) There is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or

other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines.

" . . .

(g) It is the purpose of this chapter (1) to establish interim mandatory health and safety standards and . . . to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards . . . ."

Section 102(a) of the Act, 30 U.S.C. (Supp. II) 801.

The Act's legislative history is to the same effect:

"Numerous disasters in both coal and non-coal segments of the industry underscore those areas of inadequacy of our current law and the fact that the enforcement and administration of our current mine health and safety programs has failed to produce the level of protection for our nation's miners which should be within the capacity of our current mine safety laws.

" . . .

"Mine operators still find it cheaper to pay minimal civil penalties than to make the capital investments necessary to adequately abate unsafe or unhealthy conditions, and there is still no means by which the government can bring habitual and chronic violators of the law into compliance."

S. Rep. No. 95-181, 95th Cong., 1st Sess.; 1977 U.S. Code Cong. & Adm. News 3401, 3404.

See also Id. at 3407-3409, 3426-3427 ("the primary objective of the Act is to assure the maximum safety and health of miners.")

2. *A finding of implied employee consent to warrantless health and safety inspections is reasonable under the Fourth Amendment*

The determination by Congress that the miner would consent to—in fact welcome—a warrantless inspection of the work area is reasonable. The previously-cited Senate Report documented the extreme dangers that are now part of the mining profession, and concluded that frequent inspections were essential to improve health and safety conditions. *See, e.g.,* 1977 U.S. Code Cong. & Adm. News at 3404, 3407-3409, 3426-3427. The warrantless inspection provided for in the Act is concerned with collecting that information (and only that information) which the reasonable miner would want made available to the government—information "relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in the mines." Section 103(a) of the Act, 30 U.S.C. (Supp. II) 813(a). It is at minimum then, the inspection which the miners themselves would direct, were they so positioned to act in their own best interests.

There exists an additional reason why a finding of implied consent is rational in this case. It is the miners' work area that is inspected by government, and it is their health and safety which are to be protected by the inspection. But it is not their mine. The tough practicalities of the miner-mine operator relationship make actual consent by the former to a warrantless, administrative inspection improbable, no matter how strongly that inspection will benefit his/her health and safety. A sound basis supports this conclusion.

First, the likelihood is that the worker will never be questioned for consent. The operator controls access to the mine. If the owner does not want an inspection, he/she will simply deny the inspector access to the miners' work areas.

Second, the miners are caught in an obvious squeeze; they are dependent economically upon the operator. They are unlikely to forget the source of their jobs, assignments, and

salary. If the operator refuses to consent to inspection of the mine, then the unmistakable message is that employees ought to act similarly. The miners will quickly understand that consent invites open and subtle acts of discrimination and reprisal.

Further, where working areas within the mine may be expected to fail federal standards for health and safety, the risks to the consenting miner will be perceived as especially high—the miners may rationally assume that their employer will judge them responsible for the cost of achieving compliance, and for whatever sanctions are imposed. A requirement that workers affirmatively consent to warrantless inspections of their work areas would therefore nullify their effectiveness where they are needed most.

Provisions of the Act unrelated to the warrantless inspection also reflect Congressional appreciation of the unreasonableness of demanding that workers openly cross their employer's interest in order to vindicate their own. Section 201, 30 U.S.C. (Supp. II) 813 (g)(1), for example, states that the government will preserve as confidential the identities of all miners who give notice of conditions of imminent danger.

Moreover, the Act confers upon the individual miner the benefit of the expertise of the inspector trained to recognize the dangers presented and to determine whether compliance has been achieved. The benefits of such expertise should not be lightly discounted nor deemed to be waived simply because the operator refuses to allow an inspection.

For instance, the Act provides for notice to the miner of exposure to toxic or harmful materials and further provides to miners or their representatives the right to observe the monitoring or measuring of the presence of such agents. (30 U.S.C. Supp. II, § 813(c).) It also provides a right to an immediate inspection if a miner or the miners' representative believes the Act has been violated—while carefully protecting the complainant's confidentiality to prevent retaliation and reprisal. (*Id.*, § 813 (g)(1).)

By providing these rights, Congress did not shift to every individual miner the burden of developing the sophistication and expertise of the trained inspectors authorized by the Act to exercise that expertise on their behalf. It cannot reasonably be assumed that each miner possesses or will develop such expertise, or that any miner would waive an entitlement to the expertise of trained inspectors to determine whether indeed imminent danger exists or if compliance has been achieved.

On the contrary, it is indisputably more reasonable to infer the consent of the miner to the inspections provided by the Act and to the exercise of expertise by trained inspectors for the miner's benefit.

In sum, a finding of implied consent by mine employees to safety and health inspections of their work areas is reasonable under the Fourth Amendment. Such implied consent should be upheld by this Court because of the importance of the inspections, the limits placed on the time, place and manner of the inspections and the restricted privacy interest of the mine operator in preventing the warrantless inspections authorized by Section 103(a) of the Mine Safety Act.

CONCLUSION

The judgment should be reversed.

Dated: March ....., 1981

Respectfully submitted,

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